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THE STATUTORY LIABILITY OF STOCKHOLDERS AND THEIR RIGHT TO SUBROGATION.—In the recent case of *Arthur v. Peoples Bank of Union* (S. C.), 83 S. E. 778, the Supreme Court of South Carolina was confronted with a question of unusual difficulty. The State Constitution provided that "stockholders of all insolvent corporations shall be individually liable to creditors thereof only to the extent of the amount remaining due to the corporation on the stock owned by him."¹ But it provided further that "stockholders in banks—shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same."² In the instant case the bank became insolvent, and went into the hands of receivers. The general creditors and the depositors had received their proportional shares of what seemed to be the entire assets of the bank. In accordance with the constitutional provision the depositors had also compelled the stockholders to make good the deficiency in their claims against the bank. At this stage, \$4,000 of additional assets were discovered, and the question of the proper distribution of this fund arose.

The Constitution unfortunately failed to provide in terms that the depositors should exhaust the assets of the corporation before proceeding against the stockholders. Had it done so, the relations of the parties would have been clear.

¹ Const. 1885, Art. 9. 18.

² Id.

The lower court had divided the new fund between the general creditors and the shareholders, giving the latter that proportion which would have fallen to the depositors, had the latter's claim not already been satisfied. This was done under the shareholders' right of subrogation. The higher court was equally divided upon the question, with the result that the decision of the lower court was affirmed.

The depositors having already received the full amount of their deposits, were not further concerned. The shareholders, who had thus satisfied the depositors, claimed to be subrogated to the rights of the latter, but the general creditors contested this claim on the ground that the paying shareholders were in no sense sureties, but rested under a direct primary liability by virtue of the Constitutional enactment. Between the two claimants there were obviously but three possible modes of disposing of the fund. First, it might have all been given to the shareholders, under their claim of subrogation, to the exclusion of the general creditors. Second, it might all have been decreed to the general creditors. Third, it might have been apportioned between the shareholders and the general creditors. The first of these was not seriously contended for, and was not before the court for decision.

It is evident that if the shareholders had any equity it was that of subrogation to the depositors whom they had satisfied. The latter were never entitled, as against the bank itself, to more than their proportionate share in the fund. The shareholders, standing in their shoes, could of course claim no more.

The second proposition—namely, that the entire fund should go to general creditors—received the approval of half the appellate court, and requires more serious consideration. It is based upon two premises, that is, (1) that under the Constitutional provision the shareholders are primarily liable to the depositors, and (2) that one is never entitled to subrogation upon discharging a liability for which he is primarily liable. Even if the correctness of both of these premises be conceded, the result reached by the dissenting judges would seem to be a *non sequitur*. The error arises from the circumstance that the word 'primary' has two distinct meanings. In one, it is nearly synonymous with 'direct,' and in the other with 'ultimate.' The premises might be more accurately expressed by the statement that the stockholders are directly liable to the depositors, and that one is never entitled to subrogation upon payment of a debt for which he is ultimately liable. As so expressed, the truth of these premises can hardly be denied. But it is equally certain that the liability of the stockholders is not ultimate. The bank's liability is concededly so.⁸ If that of the shareholders is regarded in the same light, then there are two persons ultimately and finally

⁸ Said Watts, J., in his dissenting opinion: "If there is not enough to pay both, then the depositors have the further right to call upon the stockholders to pay the amount fixed by their holding of stock."

responsible for the fulfilment of a single contractual obligation—a situation absurd and impossible upon its face.⁴

This consideration would seem amply sufficient to warrant the rejection of the second proposition. But that proposition is open to other and equally serious objections. The liability of the stockholders is statutory, and in derogation of the common law.⁵ As such it is to be strictly construed in favor of the shareholders.⁶ So it has been quite generally held that under the "stockholders-liability statutes" the creditors must exhaust the assets of the corporation before they are entitled to proceed against the shareholders.⁷

Again, it is apparent that to regard the shareholders as ultimately liable to the depositors would be to place the amount recoverable by the general creditors largely within the caprice of the stockholders. If the latter chose to discharge that liability promptly and voluntarily, then a far greater proportion of the Bank's assets would remain for the payment of the general creditors than if the liability were contested. For should contest be made, the depositors would of course first exhaust the assets of the bank, sharing them with the general creditors. The shareholders could then be compelled to pay only the balance due the depositors. If on the other hand the shareholders should pay voluntarily, without forcing the depositors to exhaust the bank's assets, then the shareholders would bear the entire burden of paying the depositors in full. Any such result—laying as it does a burden on the debtor who pays his debts promptly and voluntarily, and rewarding the recalcitrant and defaulting debtor—should receive no countenance in a court of equity.⁸ And surely the intent to create such a result will not be attributed to a constitutional or statutory enactment, where any other interpretation is possible.

The evident purpose of the enactment was to secure prompt, as well as full, payment of the depositors. That purpose would practically be defeated by placing the shareholders in the position of primary debtors, even to the depositors. It is fully settled that in the construction of ambiguous statutes great weight will be at-

⁴ Such a situation does arise under the law of torts. But it is occasioned by the rule that there can be no contribution between joint tortfeasors, a principle which can have no application here.

⁵ *Brunswick T. Co. v. National Bank of Baltimore*, 192 U. S. 386. Said Fuller, C. J.: "This additional liability of a stockholder depends upon the terms of the statute creating it, and as it is in derogation of the common law the statute cannot be extended beyond the words used." *COOK, CORP.*, 7 ed., § 214. Indeed the liability is almost penal in its nature. See *Wing v. Slater*, 19 R. I. 597, 35 Atl. 302, 33 L. R. A. 566.

⁶ *Brown v. Trail*, 89 Fed. 641. And see the authorities cited in note 7.

⁷ *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Cambridge Water Works v. Somerville, etc., Co.*, 86 Mass. 239; *COOK, CORP.*, 7 ed., § 219. A few cases hold that the liability of the stockholders is primary, in the sense that it is direct. *Young v. Rosenbaum*, 39 Cal. 646. But this is far from meaning that the liability is ultimate, as has been shown.

⁸ *Pace v. Pace*, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459.

tached to the practical effect of the proposed interpretation⁹—an added reason for regarding the stockholders as sureties. The decision reached by the court would seem to be the only one consistent with reason and the principles of equity.

ALLEGATIONS AS TO BENEFICIARIES IN ACTIONS FOR DEATH BY WRONGFUL ACT.—It is a well-settled rule of the common law that an action for damages for the wrongful death of a person cannot be maintained by his personal representative or his heir; since such a right is one personal to the decedent and, as such, abates with his death.¹ The rule is expressed in the maxim *actio personalis moritur cum persona*. It is supported also by the proposition laid down by Lord Ellenborough in the case of *Baker v. Bolton*² that "in a civil court, the death of a human being cannot be complained of as an injury."

This right of action, however, must be distinguished from the right to recover damages for loss of service suffered between the injury and the death, where death is not instantaneous. Such latter action can be maintained by the master, husband, parent, etc., for loss of services or consortium by reason of injury to the servant, wife, child, etc., as it is not a right personal to the deceased, but exists in favor of the person entitled to the services.³

To remedy partially this defect, the now famous Lord Campbell's Act was passed by Parliament in 1846.⁴ It gave a right of action to deceased's "wife, husband, parent, and child" where the injuries causing the death were such that the deceased, if death had not resulted therefrom, might himself have maintained an action for damages. The English rule seems to be that, since this right existed only by virtue of the statute, it could be enforced in favor of those persons alone who were named in the statute; and hence, where there were no such persons in existence, no cause of action could arise.⁵ It would seem naturally to follow that the declaration in an action under the act must allege the existence of one or more persons entitled to recover, for otherwise no cause of action would be stated.

⁹ *Worthen v. State* (Ala.), 60 South. 686; *Dixon v. Caledonian Ry.*, L. R. 5 App. Cas. 820, 43 L. T. 513, 29 W. R. 249, 45 J. P. 105.

¹ *Osborn v. Gillett*, L. R. 8 Ex. 88; *Baker v. Bolton*, 1 Camp. 493; *Bligh v. Biddeford & S. R. Co.*, 94 Me. 499, 48 Atl. 112.

² *Supra*.

³ *Davis v. St. Louis, I. M. & S. Ry. Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Covington Street Ry. Co. v. Packer*, 72 Ky. (9 Bush.) 455, 15 Am. Rep. 725.

⁴ Stat. 9 and 10 Vic. c. 93, §§ 1 and 2.

⁵ See *Seward v. Vera Cruz*, L. R. 10 App. Cas. 59, Opinion of Lord Blackburn; *Leggott v. Great Northern Ry. Co.*, L. R. 1 Q. B. 599, 45 L. J. Q. B. 557, 35 L. T. (N. S.) 334; *Bradshaw v. Lancashire & Yorkshire Ry. Co.*, L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. (N. S.) 847; TIFFANY ON DEATH BY WRONGFUL ACT, 2 ed., § 23.